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Supreme Court, U.S.
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No. 04-936

IN THE

Supreme Court of the United States

NIBCO, Inc.,
Petitioner,

v.

Martha Rivera, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

For several reasons set forth in the petition, the Ninth Circuit's holding – barring discovery of Title VII plaintiffs' immigration status in order to protect plaintiffs' purported interest in preventing exposure of their own illegal activities – merits this Court's review. First, the decision squarely conflicts with other courts of appeals' holdings that relevant discovery should not be denied if a narrower protective order could protect the interests of the party opposing discovery. Pet. 9-11. Second, the court of appeals' holding guts the "after-acquired evidence doctrine" as adopted by this Court in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Pet. 12-13. Third, this case provides an opportunity for this Court to resolve a circuit conflict concerning undocumented workers' Title VII rights and clarify whether its holding in *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 140 (2002), barring undocumented aliens from receiving back pay under the NLRA, extends to Title VII cases. Pet. 15-20. Respondents attempt to harmonize the conflicting opinions of the courts of appeals, and cite purported vehicle problems. None of their arguments are availing.

I. This Case Presents Two Square Circuit Conflicts Meriting This Court's Review.

1. Notwithstanding respondents' contentions, the Ninth Circuit's holding squarely contradicts those of other courts of appeals, and undermines this Court's precedents. The court of appeals held that discovery should be barred to protect respondents' interest in keeping their illegal immigration status private; risk of exposure, it held, would discourage undocumented workers from bringing Title VII claims.[1] But (even

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[1] An interest in keeping information private is plainly one kind of "privacy" interest, and so petitioner uses that term as shorthand for the amorphous interest the court of appeals identified. Furthermore, although the court of appeals obviously did not claim re-

assuming this interest is cognizable), the court's holding that it justifies a *complete bar* on pretrial discovery on this issue is untenable and in conflict with the law of other circuits.

For instance, in *CSC Holdings, Inc.* v. *Redisi*, 309 F.3d 988, 995-96 (2002), the Seventh Circuit held that it was an abuse of discretion for the district court to bar discovery when a more narrowly tailored protective order could adequately protect the interest of the party seeking to bar it. Respondents acknowledge *Redisi* in a footnote, attempting to distinguish it on the ground that immigration status is not dispositive as to the threshold issue of petitioner's liability. But this "distinction" ignores the holding in *Redisi* that petitioner cited, focusing on another part of the opinion. *Redisi* reversed the district court's decision to deny access to information, including cable subscriber lists, that was solely "relevant to [defendants'] efforts to present an alternative and lower calculation of damages" (and therefore "'relevant to the claim or defense of any party'"). *Id.* at 996 (quoting Fed. R. Civ. P. 26(b)(1)).

Other courts of appeals have also held that it is an abuse of discretion for a district court to bar discovery on an issue when more narrowly tailored limitations on discovery or the use or release of discovered information would accomplish the same purpose.[2] For instance, in *Metallgesellschaft* v. *Ho-*

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spondents had a *Fourth Amendment* interest at stake, cases such as *United States* v. *Place*, 462 U.S. 696 (1983), illustrate the point that shielding one's own illegal activity from exposure cannot be considered a legally cognizable interest. Contra BIO 15.

[2] Respondents allege that below, petitioner rejected the option of a protective order barring disclosure. BIO 15. That is false, as is illustrated by the very pages of the record respondents cite. During the deposition, see ER 0051-57, petitioner's counsel *accepted* respondents' counsel's initial request to stipulate to non-disclosure of immigration-related information, declining only to commit his client to ignore the information for employment purposes – a reasonable position, given that knowingly employing an illegal immigrant is a crime carrying a possible prison sentence. Thereafter, respon-

dapp, the Second Circuit held that a district court abused its discretion by denying discovery in a U.S. case on the basis that the information might be used improperly in foreign courts, when the district court could instead have issued a "closely tailored discovery order." 121 F.3d 77, 80 (1997) (following *Euromepa, S.A.* v. *R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (CA2 1995)); accord *In re Bayer AG*, 146 F.3d 188, 194 (3d Cir. 1998) ("Any patent unfairness can be dealt with by the district court crafting an appropriate discovery order."); see *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004) (agreeing with these courts' resolution of the underlying foreign-discoverability issue). The Ninth Circuit's failure to consider the possibility of such an order directly conflicts with these decisions.[3]

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dents successfully sought a total bar on discovery. In its request for reconsideration, petitioner objected to those provisions that "totally barred any deposition discovery relating to" certain elements of claims or defenses, but stated that another provision was "*not objected to* the extent that the ruling *only imposes a limit on disclosure* of that information." *Id.* at 200.

Likewise, respondents' proposed *in camera* proceedings, see BIO 5, were to take place *after* a trial on liability, Pet. App. 5a-6a, and *without petitioners present*, such that petitioners would obtain no information, nor could they cross-examine witnesses or provide rebuttal evidence. And the proposal would not have prevented the jury from using back pay as a partial basis for a punitive damage award, even if the back pay award itself was later struck on the basis of the findings of the *in camera* proceedings.

3 Respondents claim that *In re Grand Jury Subpoena (Under Seal)*, 836 F.2d 1468 (CA4), cert. denied, 487 U.S. 1240 (1988) demonstrates the inadequacy of protective orders. BIO 16. But the single sentence arguably supporting that point states only that the "temporary benefit" of protective measures restricted to the pretrial stage provides no permanent protection – illustrating petitioner's point that postponing discovery until after a trial on liability would not prevent the "chill" the court of appeals cited. 836 F.2d at 1476; see Pet. 13-14. Moreover, that decision's rejection of a protective

2. District courts of course possess considerable discretion over the conduct of discovery. Respondents make much of this fact, attempting to cast the court of appeals' decision as mere deference to the district court's fact-specific determinations. BIO 11-15. But this is a gross mischaracterization: the court of appeals' holding is not merely "fact-specific," BIO 5, but instead creates a sweeping new rule of law that will constrain the discretion of future district courts. Indeed, the court of appeals' opinion places no emphasis at all on the specific facts of the case. Respondents cannot point to a single one of its holdings or statements that would not be equally applicable to *any* dispute concerning discovery of plaintiffs' immigration status in a Title VII case.

Moreover, the opinion's use of boilerplate language concerning the standard of review does not change the fact that its principal holdings are *legal* in nature, look beyond this individual case, refer to "error" rather than "clear error," and do not suggest mere deference to (rather than actual agreement with) the district court. See, *e.g.*, Pet. App. 8a ("In this case, the protective order *was justified* because the substantial and particularized harm of the discovery . . . *outweighed* NIBCO's interests in obtaining the information at this early stage in the litigation."); *id.* 9a ("We *agree with* the district court."); *id.* 10a ("Granting employers the right to inquire into immigration status *in cases like this* would allow them to raise implicitly the threat of deportation [whenever sued]."); *id.* 11a ("The chilling effect *such discovery* could have on the bringing of civil rights actions *unacceptably burdens* the public interest."); *ibid.* ("[T]he national effort to eradicate discrimination in the workplace *would be hampered* by the discovery practices NIBCO seeks to validate here."); *id.* 19a ("[T]he district court *did not err* when it declined to modify the protective order.") (all emphases added). Plainly, district courts

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order was based on considerations specific to the grand jury subpoena context and does not demonstrate that a well-crafted order could not protect respondents' interests here. *Id.* at 1477.

in the Ninth Circuit are not free to ignore these holdings on the grounds that they were merely intended to create room for the exercise of discretion.[4] They are holdings of law, and are appropriate for this Court's review.

To the extent that some of the court of appeals' holdings *are* premised on deference to the district court – principally true of its assessment of the after-acquired evidence issue, see Pet. App. 22a, 24a – this fact does not obviate the circuit split or argue against certiorari. The above-cited cases from other circuits stand for the proposition that denial of discovery on Rule 26(c) grounds when a tailored discovery order could have alleviated the relevant hardships constitutes an abuse of discretion and merits reversal. Moreover, this Court frequently grants certiorari to review court of appeals decisions deferring to district courts' discretionary determinations. See, *e.g.*, *Ashcroft* v. *ACLU*, 124 S. Ct. 2783, 2788 (2004).

3. The court of appeals' decision also undermines this Court's decision in *McKennon*. Pet. 12-13. Respondents contend hyperbolically that *McKennon* was not intended to provide a "blank check" to conduct "*any* discovery, no matter how invasive or lacking in any specific basis. BIO 18. But petitioner has not asked for such a blank check, nor "extensive discovery into an employee's background or performance on the job." *McKennon*, 513 U.S. at 363. Petitioner straightforwardly seeks a very basic piece of information – whether plaintiffs may legally work in the United States – that requires no invasive discovery, that is obviously relevant in national origin discrimination cases, and that respondents have no right to keep secret. Respondents' suggestion that it is merely a remote possibility that they might have been ineligible to work makes no sense in light of their "chilling effect" claims: their entire "interest" in avoiding discovery is premised on their being unlawful workers.

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[4] Notably, Judge Siler wrote *separately* to argue that the district court could permissibly have granted discovery. Pet. 28a-29a.

4. This case also provides the opportunity for this Court to resolve confusion in the lower courts regarding the reach of *Hoffman Plastic* and a square conflict among the courts of appeals concerning the extent to which undocumented workers are protected by Title VII. See *SEC* v. *United Ben. Life Ins. Co.*, 387 U.S. 202, 207 (1967) (granting certiorari because of the "the need for clarifying the implications" of a Supreme Court decision); STERN ET AL., SUPREME COURT PRACTICE 235 (8th ed. 2002). It is true that *Hoffman Plastic* has not been extensively addressed by other courts of appeals. But the Ninth Circuit's *holding* concerning discovery (which relies on the weight of respondents' interests in enforcing Title VII rights), as well as its dicta on *Hoffman Plastic*'s application to Title VII, directly conflict with the Fourth Circuit's en banc holding in *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184, cert. denied, 525 U.S. 1142 (1999), that undocumented workers have *no* Title VII rights.[5] This conflict is outcome-determinative, see Pet. 18, and significant, affecting every Title VII case brought by an undocumented worker. Respondents dismiss *Egbuna* as being "pre-*Hoffman*," but do not suggest that *Hoffman Plastic* altered *Egbuna*'s status as good law in the Fourth Circuit. Indeed, *Hoffman Plastic confirmed* that status, since it *limited* and certainly did not enlarge the statutory rights of undocumented workers.

As to the *Hoffman Plastic* back pay issue itself, to be sure, the court of appeals technically avoided reaching the issue, apparently in order to evade this Court's review. In any event, petitioner has not suggested that this Court should grant certiorari *solely* to consider that issue.[6] But this case

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[5] Below, petitioner conceded *arguendo* that Title VII's protections applied to undocumented workers because the Ninth Circuit's law appeared to be settled, see Pet. App. 8a, but this Court is free to consider the question, which is plainly intertwined with the questions presented by the petition.

[6] But see STERN ET AL., *supra*, at 232 ("[C]onflicts in reasoning, even in dicta, . . . may warrant Supreme Court review.").

presents multiple issues worthy of this Court's resolution, and if the Court were to review it, it would certainly be proper for it to resolve the *Hoffman Plastic* issue, since the court of appeals' lengthy dictum would constitute a possible alternate basis for affirmation, is intertwined with the other issues presented here, and was thoroughly litigated below. See, *e.g.*, *Granfinanceria, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989).

This Court should take the opportunity to resolve that issue. Numerous district courts and state courts have addressed the issue of *Hoffman Plastic*'s application to Title VII and other statutes, and have reached conflicting results. Compare Pet. 19-20 (giving examples of cases holding that *Hoffman Plastic* applies) with, *e.g.*, *De La Rosa* v. *N. Harvest Furniture*, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (stating that *Hoffman Plastic* is inapplicable to Title VII) and *Madeira* v. *Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (inapplicable to New York labor law). Further percolation in the lower courts will accomplish little, as no trend toward consensus is apparent, and could harm litigants who alter their litigation strategies based on understandings of *Hoffman Plastic*'s application that may not be correct. See, *e.g.*, *Lopez* v. *Superflex, Ltd.*, 13 Am. Disabilities Cas. (BNA) 1339 (S.D.N.Y. 2002) (plaintiff withdrew back pay claim). This Court should therefore resolve the issue now.[7]

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[7] Respondents contend their position is supported by principles of administrative deference, implying that EEOC and NLRB have taken the position that *Hoffman Plastic* does not implicate discovery on immigration status. But first, there is nothing to defer to: NLRB interpretations of the NLRA are irrelevant in a Title VII case, and the document that respondents suggest is an "EEOC interpretation[] of Title VII," BIO 14 n.6, is actually an EEOC notice *rescinding* a prior interpretation of Title VII pending its consideration of *Hoffman Plastic*'s implications. See EEOC Directives Transmittal No. 915.002, available at http://www.eeoc.gov/policy/-/docs/undoc-rescind.html. It does not purport to interpret the statute, nor to have any binding effect. Moreover, the agencies' investigative policies do not bear on defendants' discovery rights in pri-

II. Delaying Review Until After Trial Would Irreparably Harm Petitioner And Waste Judicial Resources.

This Court's review at this stage of the litigation – rather than after trial, as respondents suggest, BIO 8 – is essential to prevent a serious waste of judicial and party resources and irreparable harm to petitioner's interests. The right that petitioner has been denied by the court of appeals' decision is the right to *pretrial* discovery of information that is essential to enable it to evaluate its damages exposure, consider and make settlement offers, including offers of judgment under Federal Rule of Civil Procedure 68,[8] and/or prepare for trial. See Pet. App. 33a-35a (Bea, J., dissenting from denial of rehr'g en banc). Denial of pretrial discovery thus undermines federal policy in favor of encouraging settlements, wasting resources. *Id.* 34a n.2. And to the extent settlements are reached, denial of pretrial discovery on immigration status systematically advantages illegal immigrant plaintiffs, undermining federal immigration policy. *Id.* 32a-33a. Post-trial review of the court of appeals' holding by this Court would avert *none* of these harms.[9]

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vate party litigation. The government's law enforcement interests do not turn on the private remedies available to particular employees, and so employees' immigration status may be irrelevant to the agencies but highly relevant in private litigation.

[8] Rule 68 illustrates the flaw in respondent's assertion that delay will not prejudice petitioner. Denying petitioner pretrial acess to critical information about damages exposure means petitioner may either make a settlement offer that is too high, or no settlement will be reached because petitioner will make no offer or too low an offer. In the latter instance, petitioner would lose protection from continued accrual of attorneys' fees, see FED. R. CIV. P. 68; Pet. App. 34a n.2, a harm that cannot be remedied post-trial.

[9] These harms are not minimized by the fact that the threshold question of *liability* under Title VII does not turn on immigration status. Obviously, defendants considering settlement care not just *whether* they may be liable, but *how much* their liability might be.

Respondents contend that this Court only reviews interlocutory appeals of discovery orders in exceptional cases, supporting their argument with two misleading examples. BIO 7-8 (citing *Cheney* v. *United States Dist. Ct.*, 124 S.Ct. 2576 (2004), and *United States* v. *Nixon*, 418 U.S. 683, 690-92 (1974)). *Cheney* and *Nixon* did involve unusual circumstances, and the Court emphasized that fact in order to justify unusual procedural remedies: in *Cheney*, a mandamus order against the district court; and in *Nixon*, certiorari before judgment. Notably, in neither of these cases – nor in any of the cases respondents cite for the proposition that "immediate review [of discovery orders] is 'not ordinarily available,'" BIO 7 – did the district court certify its discovery-related order for immediate appellate review under 28 U.S.C. 1292(b).

In this case, by contrast, the district court *did* certify the order under § 1292(b), and the court of appeals accepted that certification. See Pet. App. 5a-7a. Respondents do not argue that this certification was inappropriate. This Court has not hesitated to review discovery orders in § 1292-certified cases *not* involving executive privilege or any other particularly "unusual" circumstances, BIO 7. See, *e.g.*, *Hoffmann-La Roche, Inc.* v. *Sperling*, 493 U.S. 165, 169 (1989) (employment discrimination case); *Herbert* v. *Lando*, 441 U.S. 153, 157-59 (1979) (defamation case).[10] Similar cases involving

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[10] The Court has likewise, even in rather ordinary cases, reviewed discovery-related disputes that the court of appeals has deemed appropriate for interlocutory review on other bases than § 1292(b) certification. See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct. for the Southern District of Iowa*, 482 U.S. 522, 527-28 (1987); *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 347 & n.8 (1978). Moreover, this Court has reviewed discovery disputes even in state court cases – wherein finality is *jurisdictionally* required – when (as here) review is necessary to avert some kind of harm that cannot be rectified by later review. See, *e.g.*, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 49 (1987); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

review of § 1292(b)-certified interlocutory orders abound outside the discovery context as well. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 512 (1997); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 203-05 (1996); *Finley* v. *United States*, 490 U.S. 545, 547 (1989); *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 124-25 (1989).

Indeed, none of these cases even bother raising the question whether this Court's review of an appeals' court's ruling on a properly § 1292(b)-certified question is appropriate. That basis for that omission is clear: denial of this Court's review on non-finality grounds would undermine § 1292(b)'s purpose of facilitating "expeditious termination of litigation in the district courts" by finally resolving certain important legal questions at a relatively early stage. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 172 (1972); see S. REP. No. 2434, 85th Cong., 2d Sess., 4 (1958) (provision is designed to "sav[e] useless expenditure of court time"). Thus, the very principles respondents cite as arguments *against* interlocutory review by courts of appeals and by this Court – judicial efficiency and respect for district courts' control of cases – argue in *favor* of such review in § 1292(b) cases. See BIO 7 (citing, *e.g.*, *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995)).[11]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[11] Respondents suggest that this Court delay review to permit the district court to address the propriety of bifurcation of proceedings in the first instance. BIO 20. But petitioners have never asked this Court to decide the bifurcation issue, which may be resolved by the district court on remand in any event. The possibility of eventual bifurcation is no reason to *deny* certiorari: bifurcation could not solve the harms of denial of discovery before trial proceedings begin (but would obviate any of those denial's supposed *benefits* for Title VII enforcement). Pet. 13-14.

Respectfully submitted,

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